Brief in opposition not printed

FILED
MAY 24 1951
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 756

EDWARD KLEIN and PETER DOUNIAS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Edward Klein and Peter Dounias, respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on March 6, 1951, affirming the judgment of the United States District Court for the Southern District of Illinois, Northern Division.

The Opinion Below.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court,

sentencing each of the petitioners to the custody of the Attorney General of the United States for a period of twenty-five years. The opinion has not been published but appears in the Record at pages 168-176.

Jurisdiction.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 6, 1951 (R. 168). A petition for a rehearing was filed on March 31, 1951 (R. 178) and an order was entered denying the said petition on April 25, 1951 (R. 193). The jurisdiction of this Court is invoked under 28 U.S.C. 1251 (1). See also Federal Rules of Criminal Procedure, 37(b)(2) and 45(a).

Questions Presented.

1. Whether the petitioners were not deprived of due process of law where the United States Court of Appeals fails to discuss or dispose of, or ignores, the principal assignments of errors relied on for reversal, it appearing that the following statement of points on appeal were urged:

> "The Trial Court erred in instructing the jury as follows: 'In this case Count One charges the principals with an armed robbery, as I have defined that offense, and Count Four charges the principals on trial with an unarmed robbery, and it is for you to determine from the evidence under the rules of law which I will state to you whether or not the alleged principals, Klein and Dounias, or either of them, committed the offense charged in Count One or the offense charged in Count Four.'" (R. 147).
>
> "The Trial Court erred in instructing the jury as follows: 'Two forms of verdicts have been prepared for you. After the title, the first one is: "We, the

jury, find the defendants, Edward Klein and Peter Dounias, guilty on Counts (that should either be Count one or Count Four) and not guilty on (either Count One or Count Four)," it couldn't be guilty on both counts, and the other: "The defendants, Robert Ryan, Harry Hartzell and Harvey Green, guilty on Counts One and Two or guilty on Counts Five and Six, and not guilty on the remainder of such counts.'" (R. 147).

"The Trial Court erred in submitting and giving to the jury the following form of verdict: 'We, the jury find the defendants, Edward Klein and Peter Dounias, guilty on Counts * * * and not guilty on Counts * * * and the defendants, Robert Ryan, Harry Hartzell and Harvey Green, guilty on Counts * * * and not guilty on Counts * * *.'"

2. Whether the conduct and argument of the prosecuting attorneys was so prejudicial as to deprive the petitioners of a fair trial and, hence, due process of law, it appearing that on four occasions the prosecutors argued matters to the jury of their own knowledge (R. 148, 149), and it further appearing that the prosecuting attorneys made other highly prejudicial remarks to the jury (R. 148, 149).

3. Where a statute requires increased punishment for one who commits a felony while armed with a pistol, should the possession of a weapon by such principal be deemed to be the possession of each and every person concerned in the felony so as to make such latter person liable to the increased punishment.

4. Whether an instruction that "if the jury believes from all the evidence in the case that any particular witness has perjured himself or testified falsely, you are entitled to disregard the entire testimony of that witness

unless corroborated by other credible evidence in the case", constitutes prejudicial and reversible error since the instruction is not confined to "wilful" testimony, as to a "material" matter.

5. Whether the cross examination of a witness is limited to the direct examination and whether the cross examining party is not bound by the answers of such witness under cross examination on a collateral matter.

6. Whether the errors committed in the trial of the petitioners were so prejudicial as to be noted by a court of review as plain error under the provisions of Section 52b of the Federal Rules of Criminal Procedure and under the decisions of this Court.

Statement of the Case.

This petition presents for correction, errors of the District Court of the United States for the Southern District of Illinois, Northern Division, erroneously affirmed by the United States Court of Appeals for the Seventh Circuit and also for errors committed by the said Court of Appeals.

The indictment (R. 2-8) consists of six Counts, of which only Counts One and Four pertained to the petitioners. Count One charged that the petitioners, and one Frederick J. Pedote, did on March 13, 1949, at Peoria, Illinois, assault and feloniously rob one, Chester H. Wood, a clerk in charge of a United States Sub-Postal Station in the City of Peoria, of property belonging to the United States of America, and that in effecting the said robbery, the petitioners used a dangerous weapon and wounded the said Chester H. Wood (R. 3). Count Four charged the same facts except that the allegations with respect

to the use of a dangerous weapon in effecting and attempting to effect the robbery was omitted (R. 5).

The petitioners, Edward Klein and Peter Dounias, were found guilty on Count One, by the verdict of the jury (R. 137), and were sentenced to the custody of the Attorney General for a period of twenty-five years to be served in a penitentiary of the United States (R. 141-144).

United States postal substation No. 11, was located in a drug store at 394 Callendar Avenue, in Peoria, Illinois, and was owned and operated by one Chester H. Wood. On Sunday, March 13, 1949, at about 9:10 in the evening, the substation was the scene of a robbery; postal funds to the amount of $875.52, and certain registered letters, were taken by the robbers.

At and immediately prior to the robbery, there were only three persons in the drug store: Mr. Wood, the owner, Denzel Jines, a clerk, and Paul Bontemps, a friend.

Shortly after nine P.M., Paul Bontemps, who had been visiting in the store for about two hours, was playing a small radio toward the rear of the store. Chester Wood was using a telephone, located on a dividing wall separating the front of the store from the rear storeroom, with his back to the only store entrance. Denzel Jines, the clerk, was behind the ice cream counter near the front of the store.

Two men entered the drug store. One remained near the front of the store, while the other waving a gun in his hand ordered the clerk, Jines, to "get in the back room." He then ordered Wood to hang up the telephone, and when Wood failed to obey his command, struck him over the head with the gun. Jines was standing immediately beside the man with the gun and was again ordered

to go with Wood to the rear room. He then pointed the gun at Bontemps and ordered him into the rear room.

On the trial both Jines and Bontemps identified Edward Klein as being the armed robber.

Jines was then ordered by the robber, identified as Klein, to go to the front of the store and turn out the lights. He complied with the order and while doing so, he saw Dounias "*momentarily*", and "*momentarily*" saw a scar on the left side of Dounias' face (R. 6). Jines testified that Klein was bare-headed (R. 14); Bontemps testified that Klein wore a brown snap brimmed hat (R. 19, 20). Bontemps testified that he told the police that Klein had brown eyes and while testifying said: "I see I am right. I judge a man with a brown outfit would have brown eyes. I don't think a man with brown eyes would wear a blue outfit" (R. 20). At the police station he looked at Klein's shoes, which were of suede, and he found it necessary to look at the shoes (R. 21).

The person identified as Klein took from the person of Paul Bontemps his wallet containing seven dollars, and demanded and received from Chester Wood his watch and a diamond ring valued at $500.

The robber identified as Dounias came and took a cardboard box, given him by Klein, and after emptying the box returned to and remained in the front part of the store where the safe containing registered letters was located.

The robbery consumed about fifteen or twenty minutes. Wood, Bontemps and Jines were locked in the toilet in the rear of the store, and the robbers took their departure. Postal funds in the sum of $875.52 were taken from the safe, together with the registered letters placed

there for safe-keeping. A ring and watch belonging to Chester Wood, Bontemps' wallet with seven dollars enclosed, and also funds and other personal property of Wood, together with the small radio, which Bontemps had been operating, were taken.

Chester Wood, after having been struck on the head, could not see because of blood flowing into his eyes and over his glasses, and consequently did not identify either of the robbers.

The co-defendant and accomplice, Frederick Pedote, testified that he, Klein and Dounias, who had known each other for about a year, met in Peoria at about four P.M. on March 13, 1949. They drove around in Klein's automobile and discussed, among other things, the Chester Wood drug store, and the fact that he had a valuable diamond ring. He said that the defendant Dounias had in his possession during the drive a 45 caliber gun. Pedote stopped at his hotel and got a 38 caliber gun, which he gave to Klein. They decided that because Pedote lived in Peoria he would drive the car and wait outside while Klein and Dounias robbed the drug store.

Pedote's story was that at the time of the robbery he was in the car a short distance away from the drug store and saw the lights go out. Then Klein and Dounias came out of the drug store with a radio, and a cardboard box containing various items, and re-entered the car, and the three of them drove to a tavern and tourist camp, called the Chicken Shack, on the outskirts of Peoria. During this drive Klein told Pedote about having to strike Chester Wood on the head. Co-defendants Ryan and Hartzell were contacted by telephone and came at once to the Chicken Shack, where they were apprized of the robbery, and the proceeds derived from the robbery were

then divided equally. The postal envelopes and cardboard box were burned by Harvey Green, operator of the Chicken Shack, while defendant Klein took the diamond ring and the radio, in addition to his share of the money. Certain other articles were thrown into the Illinois River. Klein then stated that he was returning to Chicago at once and left in his car, and Dounias and his co-defendants Ryan and Pedote left a short time later, around midnight, for Hot Springs, Arkansas, in Ryan's Cadillac automobile, remaining in Hot Springs for nine or ten days. Later, Klein gave Dounias and Pedote $150 each as their share in Chester Wood's diamond ring.

The foregoing summary of the facts in the case is taken from the Opinion of the Court of Appeals except for such portions to which reference is made to the Record.

The defendant, Klein, produced six witnesses, a friend, his mother in law, his sister and her husband, another brother in law and his wife, all of whom testified that at the time of the robbery, Klein was in Chicago watching a television show. Government witness, Pedote, testified that the robbery was discussed for the first time on the afternoon of the date of the robbery (R. 29, 30).

Mrs. Klein, wife of one of the petitioners, testified briefly on direct examination by defendants' counsel. She testified that she, her husband, and five other persons, whom she named, were present at the home of Frances Higgins, sister of Edward Klein, on March 13, 1949, from eight o'clock in the evening until about midnight (R. 56). She testified that she also knew Fred Pedote and Pete Dounias (R. 57), and that was substantially all that she testified to on direct examination.

On cross examination, she testified that she also knew Bill Ryan, who visited her home and that so far as she

knew, her husband was never in Peoria (R. 60). She was then asked whether she ever received a telephone call from her husband from Peoria, Illinois, in the month of February and whether she had not put in a call for her husband on February 23, 1949, at the Niagara Hotel in Peoria. She denied making such a call; she denied making calls to her husband in Peoria on February 25th or 26th (R. 61).

She was recalled for further cross examination and was shown a telephone toll ticket to determine whether that would refresh her memory as to making a call to Peoria on February 23, 1949. Objection was made to the question and she answered in the negative. A number of other similar questions were asked whether she made calls to her husband in Peoria on February 25th and whether long distance calls were made from her home and to her home on a large number of other occasions. Objections were made to these questions but they were overruled and she answered the questions in the negative (R. 71-73).

In rebuttal, the Government produced a Mr. Harmon, the Chief Special Agent for the Illinois Bell Telephone Company in Chicago, who identified a large number of toll tickets which contradicted Mrs. Klein's testimony as to the long distance telephone calls just recited (R. 78). Over objection, these toll tickets were introduced in evidence (R. 78, 79).

In making the closing arguments to the jury, one of the Government attorneys, referring to the government witnesses, argued to the jury (R. 84):

> "You have either got to believe those men, ladies and gentlemen, or you have got to believe they are

up here committing perjury. You have almost to believe there is a conspiracy between those two people and us to frame a case against these defendants. If you don't believe their testimony, that's about what it amounts to."

He further addressed the jury as follows (R. 91):

"Every decent, law-abiding citizen of the United States is a plaintiff in a case like this, and a jury, a jury is the one that makes the laws of these cases, ladies and gentlemen."

Further remarks made by the District Attorney to the jury were:

"Now, ladies and gentlemen, what do we have in opposition to the kind of testimony that we put on. We have got what is generally known as an 'alibi'. I didn't know what the defense was in this case. Mr. Dressendorfer, I think, in his opening remarks even said he didn't know what it was going to be, although after listening to some of those witnesses on the question of his alibi I think that somebody must have known what was going to be said when they got up here, because they said it pretty well together and in unison, but I hadn't heard that story until it came up on the witness stand, *but I think I know what happened"* (R. 89).

"What they did, ladies and gentlemen, people of the type of Estelle Klein, who get up and lie like this, they just put Eddie Klein in that group. That way it was a very easy alibi to substantiate. They could tell the truth on everything except one sentence, and you can't shake them on those things because they are telling the truth, except that one sentence, and the only sentence they had to remember, the only thing they had to be careful about, to remember about, and say was, 'Eddie was there.' Why do I think they are lying? *Because I already know* that Estelle Klein is a liar because she has already proven that she is a liar." (R. 90).

"They brought in that little homely piece about him taking somebody to mass that morning. *Maybe he did for all I know. I know* you can drive from Chicago from between 12 o'clock noon or ten after 12 and 4 o'clock in the afternoon because we had a man on the witness stand today who did it yesterday. Whether Edward Klein took his mother to church that morning, *I don't know.* Maybe he did, maybe he didn't, but that doesn't mean Edward Klein wasn't down here and held up the Wood's Drug Store just the way these men said it, because Klein could have left Chicago at noon and picked Dounias up here at 4 o'clock in the afternoon and start planning whom in the City of Peoria they were going to knock in the head that night. He could have done both of these things" (R. 90, 91).

"*We know* he went back to Chicago to help establish his alibi, went back that night. Maybe he came down that noon to pull this job, *I* don't *know, but I know he was here*" (R. 91).

The Court instructed the jury, with respect to the verdict, as follows:

"In this case Count One charges the principals with an armed robbery, as I have defined that offense, and Count Four charges the principals on trial with an unarmed robbery, and it is for you to determine from the evidence under the rules of law which I will state to you whether or not the alleged principals, Klein and Dounias, or either of them, committed the offense charged in Count One or the offense charged in Count Four" (R. 117).

"Two forms of verdicts have been prepared for you. After the title, the first one is: 'We, the jury, find the defendants, Edward Klein and Peter Dounias, guilty on Counts (that should either be Count One or Count Four) and not guilty on (either Count One or Count Four)', it couldn't be guilty on both counts, and the other: 'The defendants, Robert Ryan,

Harry Hartzell and Harvey Green, guilty on Counts One and Two or guilty on Counts five and Six, and not guilty on the remainder of such counts.'

"Mr. Alexander: If the Court please, was that as to Count Four?

"Mr. Kennedy: He said, 'One and Two'.

"Mr. Alexander: You said, 'One and Two,' I believe, instead of 'Two and Three,' I think.

"The Court: If I did, I made a mistake, of course.

"The accessories, the three defendants, are charged in Counts Two and Three and Five and Six, so on this you should find them guilty or not guilty on Two and Three or Five and Six.

"I hope the jury is not as confused on these counts as I sometimes get myself.

"The other form of verdict, is this: 'We, the jury, find the defendants (and you write their names in there, one or five, five defendants herein), and we, the jury, find the defendants (whoever you may so find) not guilty.'

"Do I make myself clear?" (R. 123, 124).

The jury returned the following verdict:

"We, the jury find the defendants Edward Klein and Peter Dounias guilty on counts one and not guilty on counts ..... and the defendants, Robert Ryan, Harry Hartzell and Harvey Green guilty on counts Two and Three and not guilty on counts ....." (R. 125).

No objections were made by the attorneys for Edward Klein and Peter Dounias to any instructions or arguments of Government counsel nor to the form of verdict given. The only objections made by their counsel have been noted in the Statement of Facts.

Section 2114 of Title 18 of the U. S. Code, under which statute Klein and Dounias were indicted, reads as follows:

"Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense be imprisoned not more than ten years; and if effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

Reason for Granting the Writ.

1. An appeal from a District Court to a Circuit Court of Appeals is allowed by Rule 37 of the Federal Rules of Criminal Procedure, promulgated by this Court. The Court of Appeals failed to review two of the principal points relied on for reversal by the petitioners. Both the verdict submitted to the jury and instructions with respect thereto directed the jury to find Klein and Dounias guilty under Counts ....., and not guilty on Counts ..... It left no room for the jury to find whether either of the defendants was guilty or not guilty under the count charging an armed robbery, or whether either of the defendants was guilty or not guilty under the count charging an unarmed robbery; the punishment for armed robbery being twenty-five years, and the punishment for unarmed robbery being not greater than ten years.

The Fifth Amendment to the Constitution of the United States of America provides that no person shall be deprived of his liberty without due process of law. This Court has never determined whether due process of law

has been denied, under such Fifth Amendment, where an appeal is given and the proceedings in the Appellate Court fail to review the Assignments of Error presented to it.

With respect to the Fourteenth Amendment to the Constitution of the United States, this Court has held that where an appeal is given by the statute of a State Court, the proceedings in the Appellate Court, as well as those in the Trial Court must be considered in determining whether due process of law has been afforded or denied. *Frank* v. *Mangum*, 237 U.S. 309, 327, 35 S.Ct. 582, 59 L.Ed. 969. The failure of the Court of Appeals to review the Assignment of Errors with respect to the form of verdict and the instructions thereon, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. If the failure of the Court of Appeals to review the Assignments of Errors recited in the previous paragraphs may be considered an approval or affirmance of the instructions and form of verdict submitted to the jury, then, in that event, such conclusion is in conflict with a decision of the United States Court of Appeals for the Third Circuit, *Kosak* v. *United States*, 46 F. (2d) 906, 907.

3. Three witnesses for the Government testified that Klein was one of the robbers. Six witnesses for the defense testified that Klein was in Chicago at the time of the robbery. In arguing to the jury, the prosecuting attorney stated: "I know he was here" (R. 91), and thereby threw his unsworn statement into the balance. He also argued: "We know he went back to Chicago to help establish his alibi" (R. 91); there was no evidence

on that point. The District Attorney further argued, referring to the Government witnesses, that they had to believe those witnesses or believe that they were committing perjury; they had to believe that there was a conspiracy between those witnesses and the District Attorney to frame a case against the defendants, if the jury didn't believe their testimony (R. 84). The Circuit Court of Appeals in holding, "It is hypercritical to say that because, in discussing testimony and its effect, a District Attorney uses the words 'I know, etc.', he is thereby testifying on behalf of the prosecution," is in direct conflict with a decision of the United States Court of Appeals for the Ninth Circuit, *Taliaferro* v. *United States,* 47 F. (2d) 699, 701, holding that a defendant should not be subject to a trial on the unsworn statements of the prosecuting attorney, and that such statements constitute reversible error.

The other inflammatory remarks of the prosecuting attorney, suggesting a conspiracy between the witnesses and the District Attorney, if the jury did not believe the Government witnesses, were highly prejudicial. *Williams* v. *United States,* 168 U.S. 382, 398, and *Berger* v. *United States,* 295 U.S. 78, 84.

4. The Government's evidence failed to affirmatively show that the petitioner, Dounias, was armed during the robbery. This Court should decide the question: Where a statute requires increased punishment for one who commits a felony while armed with a pistol, should the possession of a weapon by such principal be deemed to be the possession of each and every person concerned in the felony so as to make such latter person liable to the increased punishment.

5. The Trial Court instructed the jury: "If the jury believes from all the evidence in the case that any particular witness has perjured himself or testified falsely, you are entitled to disregard the entire testimony of that witness unless corroborated by other credible evidence in the case." Such instruction was not confirmed to "wilful" testimony as to a "material" matter. The Court of Appeals referred to the omissions as "verbal inaccuracies" (R. 175), and held that, since no exception was made to the instruction, the defendants were in no position to complain. This is in conflict with a decision of the United States Court of Appeals for the Third Circuit, *United States* v. *Marcus*, 166 F.(2d) 497, 504, holding that it is the duty of the court itself to compose and give a proper instruction on any necessary subject. It is in further conflict with the decision of the United States Court of Appeals for the Eighth Circuit, *Beck* v. *United States*, 33 F.(2d) 107, 114, holding that it is the duty of the court of *its own motion* to protect suitors in their right to a verdict.

6. It appeared from the Government witness, Pedote, that the robbery was first planned on the afternoon of March 13, 1949 (R. 29, 30). Mrs. Edward Klein, a witness for the defense, testified on direct examination that Edward Klein was at the home of his sister, watching a television show, at the time of the robbery. She also testified that she knew Peter Dounias and Fred Pedote, and that was substantially all of her direct examination. On cross examination she was asked whether her husband was not in Peoria on February 23rd, 25th and 26th, and whether she had not made telephone calls to him there, and whether he hadn't made telephone calls to her from Peoria. She testified that she didn't. Over objection, one of the managers of the Chicago Telephone

Company produced toll slips to rebut Mrs. Klein's testimony. In holding that such cross examination was not on a collateral point, and that the Government was not bound by Mrs. Klein's answers, the Circuit Court of Appeals for the Seventh Circuit is in conflict with decisions of the Court of Appeals for the Fourth Circuit, *Pullman Co.* v. *Hall,* 55 F.(2d) 139, 141, and *Simon* v. *United States,* 123 F.(2d) 80, 85, and with a decision of the United States Court of Appeals for the District of Columbia, *Ewing* v. *United States,* 135 F.(2d) 633, 640.

7. The Circuit Court of Appeals held that since no objections were made by petitioners' counsel to the instructions, and to the argument of counsel, the petitioners could not be heard to complain in the court of review, and held that the alleged errors were far from obvious (R. 175, 176). This conclusion is in conflict with applicable decisions of this Court. *United States* v. *Atkinson,* 297 U.S. 157, 160; *Wiborg* v. *United States,* 163 U.S. 632, 658; *Brasfield* v. *United States,* 272 U.S. 448, 450; *Kotteakos* v. *United States,* 328 U.S. 750, 764-765; *Fiswick* v. *United States,* 329 U.S. 211, 217-220; *Krulewitch* v. *United States,* 336 U.S. 440, 444-445.

8. It appears from the foregoing that the Court of Appeals sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Office-Supreme Court, U. S.
FILED
JUN 4 1951
CHARLES ELMORE CROPLEY
CLERK

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The memorandum for the Government is slightly inaccurate when it states: "The opinion below fully answers all of the petitioners' contentions except an argument based upon the instructions to the jury which the Court of Appeals deemed it unnecessary to mention." The most important contention assigned as error was the form of one of the verdicts submitted to the jury. It cannot be said

that the Court of Appeals deemed it unnecessary to mention certain instructions to the jury; the petitioners urge that the Court of Appeals either ignored or failed to review the instructions with reference to the form of verdicts and also *the form of* verdict. The Court of Appeals stated in its opinion that the Petitioners contend that their conviction should be reversed because,

> "(a) of alleged error committed in connection with the evidence of Estelle Klein and her impeachment or contraction; (b) because of improper argument to the jury by the attorneys for the prosecution; and (c) because of *an* improper instruction given the jury by the trial court.
>
> "On behalf of Peter Dounias, it is also urged that there is no evidence that he was armed at the time of the alleged robbery." (R. 169)

More than *one* improper instruction was involved in the contested issues, and *more* than the foregoing contentions were assigned by the petitioners as ground for reversal.

One form of verdict submitted to the jury was:

> "We, the jury, find the defendants, Edward Klein and Peter Dounias, guilty on Counts ..... and not guilty on counts ....." (R. 123-124)

The other form of verdict was:

> "We, the jury, find the defendants ..... not guilty" (R. 124).

There were two counts in the indictment as to the petitioners, one charging them with an armed robbery which required a mandatory punishment of twenty-five years in prison in the event of conviction, and one charging the petitioners with an unarmed robbery, fixing punishment up to ten years. It was for the jury to determine whether

both or either of the petitioners were armed during the robbery. The jury could have found, under proper verdicts submitted to them, Dounias guilty under Count One and not guilty under Count Four, or not guilty under Count Four and guilty under Count One, or not guilty on either counts; and the same situation would have existed as to Klein; but, under the forms of verdicts submitted, the jury could only find Klein *and* Dounias guilty under Count One and not guilty under Count Four, or not guilty under Count One and guilty under Count Four, or not guilty at all.

With respect to the alleged inflammatory remarks of the prosecutor, the Government questions that the opinion of the Circuit Court of Appeals for the Seventh Circuit, with respect thereto, is in conflict with *Taliaferro* v. *United States*, 47 F. (2d) 699, 701 (C.A. 9), because in the latter case the holding was addressed to a situation where the prosecutor interjected original evidence of a crucial nature in his argument to the jury. In the petitioners' case, the prosecutors stated to the jury: "We know he went back to Chicago to establish his alibi, went back that night" (R. 91). There is no evidence in the record on which to base this statement of the personal knowledge of the prosecutors. There is a distinct conflict of evidence between the Government witnesses, testifying to the presence of Klein during the robbery, and the testimony of his witnesses that he was present in Chicago during all of the time of the robbery. The prosecutor, however, said: "But I know he was here" (R. 91).

The *Taliaferro* case is full and unequivocally states that the District Attorney has no right to make statements and arguments based upon his own knowledge, or upon anything else that is not contained in the record; the

Court adopted the language of another case stating that it is error for counsel to state his own knowledge of facts unless he has testified thereto as a witness, or to insinuate that he has knowledge of facts which are calculated to prejudice the opposite party.

And, the statement of the District Attorney to the jury, (R. 84):

> "You have either got to believe those men, ladies and gentlemen, or you have got to believe they are up here committing perjury. You have almost to believe there is a conspiracy between those two people and us to frame a case against these defendants. If you don't believe their testimony, that's about what it amounts to",

is so highly inflammatory and prejudicial that, in itself, it deprived the petitioners of a fair trial and of due process of law.

The Government, in its memorandum, has failed to answer the other reasons for granting the writ, presented by the petitioners.

Respectfully submitted,

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